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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, SIGMUND GOLDBLATT, ROBERT C. COTTEN, JR., and A. CLAIBORNE LEIGH, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners respectfully petition this Court for rehearing of the denial of the petition for a writ of certiorari entered June 17, 1968. As grounds for rehearing, petitioners state as follows:

I.

Probable Jurisdiction Noted In United States v. Nardello, No. 1277, Oct. Term 1967[1]

On the same day this Court denied certiorari in this case, probable jurisdiction was noted in *United States* v. *Nardello*, No. 1277, Oct. Term 1967. Decision by this Court in *Nardello* may authoritatively affect the

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[1] Renumbered as No. 51, Oct. Term 1968.

outcome of this case. So much is clear from a comparison of the district court's holding in *Nardello* with the Fourth Circuit's holding in this case:

Nardello	*Wechsler*
"'The term 'extortion' in 18 U.S.C. § 1952 was thus intended to track closely the legal understanding under state law, and was not designed to be more generic in scope. * * * The Pennsylvania definition of extortion, therefore, is strictly controlling in the instant case.'"[2]	"[T]he offense of using a facility in interstate commerce to promote, manage, establish, or carry on bribery and thereafter performing an act to promote, manage, establish, or carry on bribery is [not] to be equated with, and limited by, the state law of bribery."[3]

In deciding *Nardello,* this Court is faced with the following basic alternatives:

(1) It can affirm the district court's ruling that "unlawful activity" as used in 18 U.S.C. §§ 1952 (a)(3) and (b)(2) means those crimes characterized as "extortion, bribery or arson" in each state's criminal code;

(2) It can reverse the district court and hold that "unlawful activity" is defined by the substantive provisions of each state's law of "extortion, bribery or arson" irrespective of how such crimes are characterized in its code;

(3) It can reverse the district court and hold that "unlawful activity" covers any act, whether or not illegal under state law, so long as it is

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[2] *United States* v. *Burke,* 278 F. Supp. 711, 712 (E.D. Pa. 1968), probable jurisdiction noted, *sub nom. United States* v. *Nardello,* No. 1277, Oct. Term 1967.

[3] *United States* v. *Wechsler, et al.,* 392 F.2d 344, 346 (C.A. 4, 1968).

> sufficiently related to "extortion, bribery or arson" as to bring the actors within the "manifest purpose of the [federal] statute * * * ". *Wechsler, supra,* 392 F.2d at 347.

If this Court should adopt alternatives (1) or (2), petitioners automatically would be entitled to reversal of the court of appeals' decision here. Only if alternative (3) be adopted—a result eschewed in *Viereck* v. *United States,* 318 U.S. 236, 245—would *Nardello* leave undisturbed the holding of the court of appeals in this case.

The points of identity between this case and *Nardello* are therefore compelling grounds for reconsideration of the denial of certiorari here. In fact, since, in order to decide *Nardello,* the Court must consider both the language of 18 U.S.C. §§ 1952(a)(3) and (b)(2) and their legislative history—the same materials which control the outcome of this case—the Court should permit this case to be briefed and argued together with *Nardello* if only to explore, determine, and authoritatively settle the meaning of "unlawful activity" as that term is used in the statute. It is particularly appropriate that this be done here because (1) the statutory question will more often arise in a *Wechsler* (substantive provision of the state statute), rather than in a *Nardello* (title of the state statute), context and (2) the court of appeals' holding in this case is in direct conflict with the district court's holding in *Nardello.* The Court should therefore permit this case to be briefed and argued together with *Nardello.*

Failing that, the Court should defer further consideration until after *Nardello* has been decided on the merits. If, in deciding *Nardello,* this Court should construe §§ 1952(a)(3) and (b)(2) in accordance with alternatives (1) or (2) above, this petition

should be granted and petitioners' convictions reversed. This was the course followed in *Forgett* v. *United States,* 390 U.S. 203, where the Court deferred consideration of a petition for rehearing from a denial of certiorari pending decision of a related question in *Marchetti* v. *United States,* 390 U.S. 39, in which certiorari had been granted following the denial of certiorari in *Forgett.* Petitioners should not be sent to prison while the question whether they have been convicted of a nonexistent crime awaits decision in *Nardello.*

II.

Pre-trial Proceedings In United States v. Reynolds, et al., Crim. No. 1208-67 (D. D.C.)

As an alternative to plenary review, this case should be remanded for further proceedings in the district court in accordance with the procedure outlined in *Hoffa* v. *United States,* 387 U.S. 231, 233. See *Kolod* v. *United States,* 390 U.S. 136, petition for rehearing pending. It now conclusively appears that petitioners' Fourth and Fifth Amendment rights were violated as a result of the introduction of incriminating evidence obtained from them by IRS agents who were "fronting" for the Justice Department's Organized Crime Section.[4]

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[4] Petitioners timely raised this question by motion to suppress in the district court, and argued it in the court of appeals. The issue was not included in the petition for writ of certiorari because some of petitioners' counsel were of the view that the factual record was insufficiently clear to warrant review. The same question is raised in the pending petitions for writs of certiorari in *Parrish and Parzow* v. *United States,* Nos. 1379 and 1382, Oct. Term 1967 (renumbered Nos. 70 and 72, Oct. Term 1968), another case arising out of alleged corruption in Fairfax County, Virginia. That case was tried by the same judge who presided in this case

On the very morning the Court denied certiorari in this case, counsel obtained a copy of the transcript of a pre-trial proceeding held June 4-5, 1968, in *United States* v. *Reynolds, et al.,* Crim. No. 1208-67 (D. D.C.), another case arising out of alleged corruption in Fairfax County, Virginia. In *Reynolds,* a number of the Internal Revenue agents, who in this,[5] *Parrish-Parzow,* and other cases, secured incriminating evidence under the guise of conducting routine audits of petitioners' tax returns (*Reynolds,* Tr. 19-20, 44, 61, 128, 131, 207, 211, 214, 227, June 4 and 5, 1968), admitted that, at the time they were ostensibly auditing these returns, they were, in fact "investigating bribery in Fairfax County of Public Officials" (Tr. 43-44, 68, 94, 114, 254, 264) as part of the "Metro Project", a joint IRS-Justice Department task force (Tr. 90, 114), operated under the "direction" (Tr. 137) of Edward T. Joyce, an attorney in the Justice Department's Organized Crime Section, who "supervised the bringing of indictments and prosecution of all violations of Section 1952 throughout the country both by the FBI and by the Internal Revenue Service" (Tr. 151).

Although a taxpayer may not assert a privilege against self-incrimination with respect to his tax rec-

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and was decided by the court of appeals the same day it decided this one. In fact, much of the *Parrish-Parzow* argument depends upon the record in this case (*Parrish-Parzow,* Br. in Op. 10, ftn. 10). In opposing certiorari in *Parrish-Parzow* the Government does not argue the issue is insubstantial, but asserts that "the record * * * contains no support for the claim that the Government obtained this evidence by misrepresenting to petitioners that the investigation it was conducting * * * was a purely civil inquiry, without criminal aspects or overtones." (Br. in Op. 10).

[5] See, *e.g.,* G.Ex's 15 and 16 (CA 446, 447); testimony of IRS Agent McElroy (CA 151-152); testimony of IRS Agent Evangelist (CA 235); testimony of IRS Agent Hutnick (CA 239-250).

ords, is compelled to turn over such records to IRS agents under pain of violating 26 U.S.C. § 7203, and is not entitled to a *Miranda*[6] warning even though he later be indicted for tax fraud (*e.g., Kohatsu* v. *United States,* 351 F.2d 898, 900-902 (9 Cir. 1965), *cert. denied,* 384 U.S. 1011), the rule is otherwise where the IRS agents' overriding interest is not "the collection of revenue, [but] the prosecution of [alleged bribers]." *Grosso* v. *United States,* 390 U.S. 62, 68-69; *Marchetti* v. *United States,* 390 U.S. 39, 73-74 (Brennan, J., concurring). It follows that, if a state conviction was set aside in *Bumper* v. *North Carolina,* No. 1016, Oct. Term 1967, decided June 3, 1968, because an officer gained entry by falsely representing that he had a search warrant, petitioners' convictions must be set aside also. Here IRS agents gained access to petitioners' records by falsely representing they were conducting routine tax audits.[7]

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[6] *Miranda* v. *Arizona,* 384 U.S. 436.

[7] In *Reynolds,* IRS Agent Evangelist, who conducted the "routine audit" of Trailer Court Ventures in this case (CA 108-109, 234-239), testified as follows:

> "Q. But, sir, what impresses me is that in this particular case a special agent [McElroy] and a supervisor of a project [Cole] deliberately engaged in seeking out criminal activities gave you your instructions at the outset to conduct a 'civil tax audit'.
>
> "A. That is correct." (Tr. 211)

III.

The Petition for Certiorari in Parzow v. United States, No. 72, Oct. Term 1968

A petition for certiorari in *Parzow* v. *United States*, No. 72, Oct. Term 1968, is presently pending. That case raises the question whether a defendant is entitled to have the trial judge ask prospective jurors on the *voir dire* whether any juror might be prejudiced against a defendant who belongs to the Jewish faith (*Parzow*, Pet. 2). As we made clear in the petition for certiorari in this case, the very same question is involved here. We there pointed out: "If certiorari is granted in that case [*Parzow*], we will move to amend our petition to include that issue as one of the 'Questions Presented' here" (Pet. 8, ftn. 8). Since petitioners Wechsler, Goldblatt, and the Faigens are each Jewish and since the Court has twice held that a criminal defendant must be granted the opportunity to inquire on the *voir dire* whether any juror harbors a prejudice against the particular race or religion of which the defendant is a member (*United States* v. *Aldridge*, 283 U.S. 308, 312-313; *Swain* v. *Alabama*, 380 U.S. 202, 220-221), consideration of this case should be deferred until after disposition of the petition for certiorari in *Parzow*.

CONCLUSION

By reason of the foregoing, the petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Counsel hereby certifies that the above petition for rehearing filed pursuant to Rule 58(2) of the Rules of this Court is presented in good faith and not for delay, and that said petition is restricted to grounds confined to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioners although not previously presented.

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